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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Hyperion Telecommunications, Inc.	)	CCB/CPD No. 96-3
Petition Requesting Forbearance	)	
	)	
Time Warner Communications	)	CCB/CPD No. 96-7
Petition for Forbearance	)	
	)	
Complete Detariffing for	)	
Competitive Access Providers and	)	Docket No. 97-146
Competitive Local Exchange Carriers	)	

COMMENTS

MCI TELECOMMUNICATIONS CORP.

Donald J. Elardo
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Dated: August 18, 1997

SUMMARY

The Commission should terminate this proceeding without adopting its mandatory detariffing proposal because it lacks the legal authority to impose a detariffing requirement on common carriers subject to the Communications Act of 1934, as amended. The "forbearance" authority granted the Commission under the Telecommunications Act of 1996 only provides a capability for the Commission to refrain from enforcing the tariffing requirement established by the Act, not from eliminating it altogether.

The 1996 Act does allow the Commission - after certain statutory requirements are met -- to permit carriers to tariff or not to tariff as they alone choose. And, based upon the record established in this proceeding, it appears that such permissive detariffing is supportable for Competitive Local Exchange Carriers (CLECs) or Competitive Access Providers (CAPs). The Commission should affirm the legitimacy of that approach for these carriers in this proceeding, while declining to adopt the unlawful mandatory detariffing approach.

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COMMENTS

MCI Telecommunications Corporation, including its affiliates (MCI), respectfully submits these comments in response to the Commission's "Notice of Proposed Rulemaking" herein, released June 19, 1997.[1] Therein, the Commission seeks comment on its tentative conclusion that "complete detariffing" -- as distinct from "permissive detariffing," which it now allows -- would serve the public interest if adopted for application to certain carriers. For the reasons set forth herein, the Commission lacks the requisite legal authority to impose "complete" or mandatory detariffing and, accordingly, it should terminate this proceeding without taking the action proposed. This will have the practical -- and proper -- effect of allowing the affected carriers to tariff or not to tariff, as they alone choose.

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[1] FCC 97-219 (*CLEC/CAP NPRM*).

This proceeding arises from petitions filed by two entities, Hyperion Telecommunications and Time Warner Communications, which sought authority under Section 10 of the Communications Act of 1934, as amended,[2] to discontinue tariffing their common carrier telecommunications services. Both are "Competitive Access Providers" (CAPs) or "Competitive Local Exchange Carriers" (CLECs),[3] and presumably would prefer to transact with their customers by contract rather than by tariff.[4]

BACKGROUND

The Commission last considered mandating detariffing in 1996, when it proposed, under the new telecommunications law,[5] that *all* non-dominant carriers be required to detariff

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[2] 47 USC Sec. 160.

[3] Generally, CAPs or CLECs furnish exchange access services to interexchange carriers so that the latter can originate and/or terminate their customers' long distance traffic. In so doing, they seek to compete with the monopoly providers of exchange access services, such as Local Exchange Carriers (LECs), in general, or Regional Bell Operating Companies (RBOCs), in particular. The latter entities are usually referred to as "Incumbent Local Exchange Carriers" (ILECs), which term differentiates them from the CLECs.

[4] It is important to recognize that CAP or CLEC customers generally are common carriers subject to Commission jurisdiction, as distinct from end-user consumers of telecommunications services. Accordingly, they are sophisticated "players" for whom none of the protections found in tariffing is needed.

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)

their domestic common carrier services.[6] That decision was appealed to, and stayed by, the DC Circuit pending further proceedings.[7]

MCI opposes mandatory detariffing because the governing statute does not permit that approach. Rather, it allows *only* for the permissive detariffing adopted by the Commission for application to CLECs/CAPs.

ARGUMENT

I. Mandatory Detariffing Exceeds The Commission's Authority

The 1996 Act confers only limited authority upon the Commission to "forbear from applying any regulation or any provision" of the Act, if particular conditions are met. In this proposal (as well as the one under appeal), however, the Commission is seeking to go much further than the governing statute permits by adopting a mandatory detariffing regime that would *prevent* carriers from complying with the tariff-filing obligation reflected in Section 203(a) of the Act, 47 USC 203(a).

The history of the Commission's attempts to detariff prior to passage of the 1996 Act highlights why the

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[6] *Second Report and Order, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, 11 FCC Rcd 20730 (1996) (*Mandatory Detariffing Order*).

[7] *MCI Communications Corp. et al. v. FCC*, Case No. 96-149.

Commission simply cannot do what it is attempting here. Prior to passage of the 1996 Act, the Commission had attempted to alter the tariff filing obligation imposed on carriers by Section 203 in two ways. First, it chose to forbear from enforcing the requirements of Section 203 against non-dominant carriers. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order,* 91 F.C.C.2d 59 (1982) and *Fourth Report and Order*, 95 F.C.C.2d 554 (1983). Under this "permissive tariffing" approach, most non-dominant carriers elected not to use tariffs as the transactional mechanism to establish the prices, terms and conditions governing their business relationships with *large* business customers, but instead handled those relationships through individually negotiated contracts. These same carriers, however, continued to govern their relationships by tariff with the millions of residential and small business customers with whom individual contracts were not entered.

Second, in the *Sixth Report and Order*, 99 F.C.C.2d 1191 (1984), the Commission went further and attempted to carry out mandatory detariffing. Non-dominant carriers were to be precluded from complying with the requirements of Section 203; and all their tariffs on file were to be canceled, with no new tariffs being filed. In 1985, this mandatory detariffing approach was rejected as beyond the reach of the

Commission's legal authority.[8]

Permissive detariffing, or forbearance, which was reinstituted after the *Sixth Report and Order* was invalidated, was struck down a decade later, in 1994.[9] In both instances, the courts found that the power given the Commission in Section 203 to "modify" the tariff filing requirement did not give it the authority to *eliminate* the requirement altogether. Citing dictionary definitions, the Supreme Court held that the word modify means "to change moderately or in minor fashion."[10]

In the wake of these decisions invalidating both mandatory and permissive detariffing, Congress expanded the Commission's legal authority under the Act. While it gave the Commission authority *to forbear* from applying the tariff filing requirement if certain findings could be made by the Commission to support such an action, it did *not* give the Commission the authority to go as far as it had attempted to in the *Sixth Report and Order* and in the *Mandatory Detariffing Order* -- eliminating one of the Act's requirements. Nor did it give the Commission authority to

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[8] *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (1985).

[9] *See MCI Telecommunications Corp. v. AT&T, et al.*, 114 S.Ct. 2223 (1994).

[10] *Id* at 2229.

prohibit carriers from complying with the Act's existing -- and retained -- Section 203(a) tariffing requirements.

The scope of this new authority is clear: the same dictionaries that the Supreme Court relied upon in deciding the scope of the Commission's power "to modify" also define "forbear" as "refraining from action."[11] Thus, Congress clearly gave the Commission the authority to refrain from enforcing the mandates of the Act, including Section 203's requirement that carriers *must* file tariffs, but it just as clearly did not give the Commission the authority to re-write the Act *to prohibit* carriers from relying on tariffs to govern their business affairs, especially with the millions of smaller customers whose relationship with carriers is entirely premised on tariffs.

The Commission does not dispute that what it is proposing here exceeds the ordinarily accepted definition of forbearance. Instead, it has contended that "forbear" must be interpreted in accordance with the Commission's historical usage of the word, which is broader than the accepted definition.[12] But, each example cited by the Commission in support of its action was either not on point, utterly ambiguous, or an indication that the Commission

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[11] *See* Black's Law Dictionary 329 (5th ed. 1983); Webster's Third International Dictionary 886 (1981) (same); Random House Dictionary 748 (2d Ed. 1987) (same).

[12] *See Mandatory Detariffing Order* at Para. 71.

otherwise is occasionally sloppy with language.[13]

Critically, the Commission has been unable to point to anything indicating that Congress intended to redefine the term "forbear". When construing a statute, it must be assumed that the "legislative purpose is expressed by the ordinary meaning of the words used."[14] Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[15] In this case, the ordinary meaning of the language used in the statute is plainly not sufficiently broad to encompass mandatory detariffing, or forcing any carrier against its will to cease tariffing its services. Nor is there anything to indicate that Congress intended the language to mean anything other than that which it ordinarily means. Indeed, had Congress intended such a result, it would have amended Section 203 itself to reflect such intent. Accordingly, the Commission's attempt to bootstrap its desire to eliminate the Section 203 tariffing obligation by relying on its authority to forbear from applying the Act simply cannot withstand scrutiny.

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[13] *Id,* at Paras. 71-72.

[14] *Richards v. United States,* 369 U.S. 1, 9 (1962).

[15] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982).

II. Permissive Detariffing Is Supportable For CLECs/CAPs

The 1996 Act authorizes the Commission to forbear from applying any provision of the Communications Act, if it determines that: (1) enforcement is not needed to ensure that carrier undertakings are consistent with Sections 202(a) and 201(b) of the Act;[16] (2) enforcement is unnecessary to protect consumers; and (3) forbearance would be consistent with the public interest.[17]

The new law granted substantial flexibility to the Commission in connection with its exercise of forbearance authority by explicitly providing that forbearance may affect a particular carrier or carriers, a particular service or services, a particular class of carriers, or a particular class of services.[18] Thus, in the matter at hand,

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[16] Section 202(a) provides, in pertinent part, that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services in connection with like communication service ...," and Section 201(b) provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful ...." Together with the tariffing obligation contained in Section 203 of the Act, these provisions traditionally have been viewed as the cornerstone of regulation under Title II.

[17] 1996 Act at Section 401 (adding Section 10(a)). In addressing this requirement, the Commission specifically is obligated to consider whether its forbearance undertakings would promote competitive market conditions.

[18] Id. at Sections 10(a) and 10(c).

it was not inappropriate for the Commission to address permissive detariffing in the context of a particular class of carriers, as distinct from all non-dominant carriers. This measured approach to common carrier deregulation, in fact, is fully consistent with that which had been taken by the Commission during the past two decades.

To meet its statutory obligation, however, the Commission must collect and analyze market and other data to support its action. Old or prior findings and conclusory assertions simply cannot sustain forbearance action. Rather than evaluating the carriers seeking not to be required to file tariffs (as well as their service offerings and their customer base), the Commission merely includes in this important deregulatory undertaking a discussion of why permissive detariffing is better than tariffing and, then, to get where it really wants to be, why mandatory detariffing is preferable to permissive detariffing.[19] This

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[19] *See Mandatory CLEC Detariffing NPRM* at para. 34, wherein the Commission suggests, again in conclusory fashion, that mandatory detariffing will cure a number of ills caused by tariffing , such as the filed rate doctrine, the alleged use of tariffs for price signaling, the higher transactional costs suffered by carriers, and the costs associated with maintaining and filing tariffs. Still present in the Commission's repertoire of reasons for detariffing are two that continue to make no sense whatsoever. First, there is a suggestion that carriers can implement service changes more rapidly in a non-tariff environment. For this to occur, carriers would need to be able to effectuate service changes *on less than one day's notice,* clearly an impossible task. Second, the Commission alleges that "[c]omplete detariffing could also reduce the administrative burden on

is insufficient to justify the action taken under the new law.

In any event, as suggested above, MCI believes that, given the nature of the carriers seeking not to have to tariff, the nature of their services, and their customer base, a sound case can be made for tariffing forbearance for them under the 1996 Act. However, as noted herein, such forbearance lawfully can mean only permissive detariffing, not mandatory detariffing, and the Commission should use this proceeding to sustain its decision that permissive detariffing for CLECs/CAPs will serve the public interest.

CONCLUSION

For the reasons set forth herein, the Commission should find and conclude that that it lacks the authority to mandate detariffing, and it should apply its forbearance or permissive detariffing authority, if at all, only after

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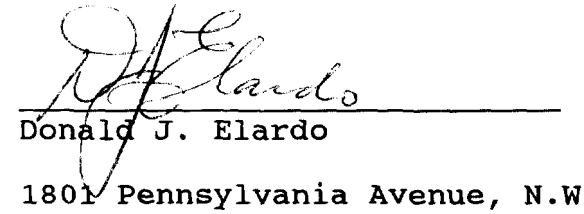
the Commission of maintaining the tariff filing program." In this regard, it is time for the Commission to support its position. MCI alone, based on the number of federal tariff filings made in July 1997, will be paying tariff-filing fees this year in excess of $150,000. (To the extent that some might contend that mandatory detariffing will eliminate the need to pay these fees and that result would be financially advantageous, it should be noted that such a conclusion could only be reached after an assessment of what the alternative costs to carriers and their customers would be from detariffing. For MCI Mass Markets, which consists of residential and small business customers, that cost was estimated to be approximately $100,000,000 per year. *See* "Affidavit of Victoria Harker," Vice-President of Finance for Mass Markets, dated January 6, 1997, which is appended hereto and incorporated herein.)

carefully considering factors pertaining to the nature of the carriers seeking authority not to tariff, including their services, markets, and customer bases.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

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1801 Pennsylvania Avenue, N.W.
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(202) 887-2006

Its Attorney

Dated: August 18, 1997

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Petitioner,	)	No. 96-1459
	)	
v.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondents.	)	

AFFIDAVIT OF VICTORIA HARKER

I, Victoria Harker, being first duly sworn, depose and say as follows:

1. I am Vice-President of Finance for the Mass Markets segment of MCI Telecommunications Corporation ("MCI"). That which follows is true to the best of my knowledge and recollection, is based upon my involvement, both current and past, in the conduct of MCI business in the Mass Markets segment, and is offered to support MCI's request for a stay of the Federal Communications Commission's ("FCC's") detariffing decision, pending the Court's hearing and deciding MCI's pending appeal of that action.

2. In the absence of a stay, it will be necessary for MCI to immediately begin to implement processes and procedures to "detariff" -- that is, cancel all of those tariffs on file with the FCC that contain the terms and conditions, including pricing, for all its domestic, interstate service -- on or before August 23, 1997. It is my understanding that such tariffs currently

serve, under law, as the basis for carriers such as MCI to transact with, and provide service to, their customers such that, in their absence, affected carriers will, to the extent possible, need to re-order completely their transactional relationships with their customers.

3. Tariffing, which has been the legal transactional norm between carriers and their customers for more than sixty years, serves as a fair, efficient and cost-effective way to transact for telecommunications services. This is especially the case where there are millions of customers with whom carriers have no "face-to-face" relationship after a sale other than via billing, which is often done by third party billing agents. Tariffs allow carriers to introduce new products and product changes quickly and inexpensively, and lend a certainty to the transaction by binding carriers and customers alike to their terms. Removing tariffs as a transactional medium will require carriers to enter into contractual relationships with their customers -- assuming they have the practical ability to do so -- at much greater cost and with resulting transactional uncertainties.

4. The challenges associated with detariffing are not uniquely MCI's; rather, it is an industry problem. Given that MCI's market share in the U.S. domestic interexchange industry approximates twenty (20) percent, the impact on the industry can be seen by taking MCI "numbers," as related below, and multiplying them by a factor of five (5) in order to calculate the overall impact on the industry.

5. It also should be realized that the nine-month period allowed by the FCC to complete transitioning of customers from tariffs to contracts does not mean that immediate and substantial efforts are not required to meet that deadline. Indeed, planning for implementation must begin now if that deadline is to be met. Particularly troubling is the concern that incremental resources needed to carry out the effort must begin to be expended now (and paid over the next several months) while there remains uncertainty as to whether the FCC's decision is legally sustainable. It would be especially wasteful if MCI were obliged to expend the monies needed to comply with the FCC's decision if that action is ultimately found in court to have been unlawful. Transitioning from tariffing is simply not an exercise that can be implemented easily during the month or two preceeding the August deadline. Efforts must commence now.

6. MCI has approximately seventeen (17) million customers in the Mass Markets segment of its business, which consists of residential and small business consumers. Its business relationship with all those customers will need to be altered to satisfy the FCC's requirement. MCI projects that it expects to gain at least sixteen (16) million new customers during 1997, all of which would be required to be served under individual customer contracts rather than tariffs by the end of this year. For these new customers alone, MCI forecasts that it would cost $20 million to establish -- and process -- contracts for service. Given the number of existing customers, a like

amount would be incurred in converting them from tariffs to contracts.

7. For example, assuming that, following the conversion of MCI's customers from tariffs to contracts, changes to the business relationship with existing customers could only be achieved through the rendition of actual notice by bill-insert mailings, MCI estimates that each such mailing would cost approximately $600,000. Assuming that such inserts would be needed in each monthly billing because of the dynamism of the market and the products therein, MCI would need to expend over $7 million on an annual basis. "Special mailings," if needed to introduce new products or product changes, would cost even more because these would have to be stand-alone in nature as compared to part of another mailing. Thus, MCI estimates that, for each such special mailing -- assuming by postcard only -- the cost would be $8 million. Just six of these special mailings over the course of a year would cost $48 million.

8. In addition, MCI conservatively estimates that, if only ten percent of <u>new</u> customers contact MCI Customer Service with questions regarding their contracts, the cost to MCI will be $5.6 million. Again, doubling that figure to accommodate the entire customer base yields an additional cost to MCI of more than $11 million. Thus, switching customers from tariffs to contracts will have a significant cost impact on customer service operations.

9. Finally, MCI estimates that, for the new customers that it expects to gain in 1997, detariffing will cause MCI to forfeit approximately $2.4 million. This would result from customer defections relating to the delay experienced between the conduct of Third Party Verification of a telemarketing sale and contract execution or other contract processing. In addition, detariffing places at risk the entire category of casually billed calls--such as MCI's 1-800-COLLECT service--due to the fact that the absence of a tariff eliminates the current method of establishing an agreement between the customer and the carrier providing these collect calling and other "transactional" services. Implementing an alternative way to establish a binding, enforceable agreement to ensure payment will inevitably result in significantly increased costs associated with these services.

10. In view of the foregoing, MCI estimates that the cost associated with shifting its business in the Mass Markets segment from tariffs to contracts would approach or exceed $100 million each year. This does not take into account the additional costs that would be incurred in shifting its customer base back to tariffs in the event the court overturns the FCC's decision.

11. Whenever a carrier incurs costs, it essentially has two choices: It can "absorb" those costs, thereby reducing its operating margins; or it can pass those costs on to its customers in the form of rate increases. Thus, if the Commission's Order is not stayed, MCI will either have to bear

enormous costs itself, pass the burden on to its customers, or pass on part of the costs while absorbing the balance. What is certain is that some party will bear the enormous burden of complying with the Commission's detariffing Order, a burden that will have been unnecessarily incurred if the Commission's Order is eventually overturned.

FURTHER AFFIANT SAYETH NOT.

Victoria Harker

Subscribed and sworn to before
me this 6th day of January, 1997

My Commission Expires March 31, 1998